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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

MOTION TO DISMISS AND AFFIDAVIT IN SUPPORT THEREOF AND DECISION OF ENGLISH COURT HEREIN.

THEODORE L. BAILEY,
Counsel for Respondent.

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BOWRING, JONES & TIDY, LTD., RESPONDENT.

NOTICE OF MOTION TO DISMISS.

To CLETUS KEATING,
Counsel for Petitioner:

Please take notice that a motion to dismiss the writ in the above-entitled cause is about to be filed in the Supreme Court of the United States and that such motion will be submitted to the Supreme Court for consideration by the Clerk of that Court at the proper time, and that the grounds of the motion will be urged at the oral argument of this appeal.

A copy of the motion to dismiss is served upon you herewith.

THEODORE L. BAILEY,
Counsel for Respondent.

Service accepted this — day of April, 1930.

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

STATE OF NEW YORK,
County of New York, ss:

THEODORE L. BAILEY, being duly sworn, deposes and says that he is the proctor for the respondent, BOWRING, JONES & TIDY, LTD., in the above entitled appeal.

That this action was begun in Admiralty by the respondent Bowring, Jones & Tidy, Ltd., on July 16, 1928, in the United States District Court for the Southern District of New York, to secure the return of £1334.2.9, a deposit made in general average by Bowring, Jones & Tidy, Ltd., to Charter Shipping Company, Ltd., or its agents.

Upon information and belief, some weeks after this action was brought, an action for a declaratory judg-

ment was commenced by the petitioner, Charter Shipping Company, Ltd., against Bowring, Jones & Tidy, Ltd., in the King's Bench Division, London, England, in which action the Charter Shipping Company, Ltd., asked for a judgment that it might properly retain said deposit and in the same action, Bowring, Jones & Tidy, Ltd., counterclaimed for the return of said deposit.

Upon information and belief, during the pendency of this appeal in this Court on the question of jurisdiction, Bowring, Jones & Tidy, Ltd., made a motion in the English Court to stay the English action until this appeal, herein, could be decided.

But Charter Shipping Company, Ltd., opposed said motion and insisted that the English action be tried forthwith.

Upon information and belief, that thereupon the English action was tried on the merits during the course of several days and was decided by Mr. Justice Roche in the King's Bench Division. A copy of the decision as reported in *Lloyd's List and Shipping Gazette* on April 2, 1930, is attached hereto marked Exhibit A.

As the result of said decision the Charter Shipping Company, Ltd., must return about seven-eighths of said deposit to Bowring, Jones & Tidy, Ltd.

Although Bowring, Jones & Tidy, Ltd., chose this forum and opposed the trial of the action brought by petitioner in England involving the same facts, nevertheless, in view of the substantial justice done Bowring, Jones & Tidy, Ltd., in the action brought by the

Charter Shipping Company, Ltd., in the English Court, Bowring, Jones & Tidy, Ltd., has no desire to continue the present action, and it is believed that the decision of the English Court renders the present action moot.

WHEREFORE BOWRING, JONES & TIDY, LTD., prays that the writ of certiorari heretofore granted herein be dismissed, with costs to respondent in all Courts, and that Bowring, Jones & Tidy, Ltd., have leave to discontinue the action.

THEODORE L. BAILEY.

Sworn to before me this 19th day of April, 1930.

[SEAL.] ELSA MULLER,

Notary Public, Bronx County No. 100.

Bronx County Register's No. 3117.
Cert. filed in New York County No. 189.
New York Co. Register's No. 114162.
Commission expires March 30, 1931.

EXHIBIT "A."

KING'S BENCH DIVISION, TUESDAY, APR. 1, 1930.

Claim for General Average.

CHARTER SHIPPING COMPANY, LTD.

v.

BOWRING, JONES & TIDY, LTD.

Before Mr. Justice ROCHE.

The hearing of this action was continued today. The Plaintiffs, the Charter Shipping Company, Ltd., of Mount Stuart Square, Cardiff, claimed for a general average contribution alleged to be payable by the defendants, Messrs. Bowring, Jones & Tidy, Ltd., of Leadenhall Street, London, as owners of cargo ex plaintiff company's steamer CHARTERHAGUE. The defendants denied indebtedness, and counterclaimed for the return of a sum of £1203 14s. 2d. deposited by them, together with interest.

The previous proceedings were reported in Lloyd's List of March 22, 25, 26 and 27.

Mr. C. R. Dunlop, K. C. and Sir Robert Aske (instructed by Messrs. Holman Fenwick & Villan) appeared for the plaintiffs; Mr. G. P. Langton, K. C., and Mr. James Dickinson, K. C. (instructed by Messrs. Hill, Dickinson & Co.) represented the defendants.

The plaintiffs were indorsees of bills of lading for a considerable quantity of cargo which was shipped in the CHARTERHAGUE at Jacksonville, Gulf of Mexico, in October, 1926, and subsequently delivered

in London. Shortly after leaving Jacksonville the ship ran aground. She was refloated after being aground nearly three hours, and plaintiffs said that as the result of the accident her machinery, boilers, &c., were damaged. The defendants contended that the CHARTERHAGUE was not seaworthy when she left Jacksonville, and that if (which was not admitted), any general average sacrifice or expenditure was incurred, it was due to the vessel's unseaworthiness. Plaintiffs denied that the ship was unseaworthy when she started on the voyage.

Mr. Richard John Sladden, an official in the classification department of Lloyd's Register, gave evidence today. He stated that a certificate dated May, 1926, was issued on the satisfactory completion of the whole of the periodical special survey No. 1. That survey was completed at Glasgow in 1926, and the customary notation in the Register was assigned by the Glasgow Committee. Under no circumstances would the certificate have been issued unless both the hull and machinery surveys had been fully complied with. The Hamburg survey in December, 1926, to which reference had been made during the hearing, was purely a damage survey. It was not in the least a special survey.

Judgment.

Mr. Justice Roche, giving judgment, recalled the circumstances of the grounding of the CHARTERHAGUE, and said that on the subsequent voyage to London and Hamburg she made a very bad passage, and her engines and boilers worked very unsatisfactorily. She had to put in to more than one port of refuge by reason of shortage of coal, and other matters, and when she ultimately arrived at Hamburg it

was found that her boilers were in a state which could only be described as dreadful. They were water-tube boilers and they were a mass of scale. His Lordship said he was satisfied that the trouble with those boilers was not due to the grounding but to the treatment they had received at other periods of the vessel's career.

The claim of the plaintiffs was a claim in general average, and was based upon the York/Antwerp Rules, 1890, which Rules, by agreement between the parties contained in the bills of lading, were to apply and regulate the rights and liabilities of the parties in respect of general average. It was said on behalf of the plaintiffs that slight damage to the hull, a good deal to the machinery, and still more damage to the boilers, was brought about by the intentional working of the engines when the vessel was aground, in such circumstances that the vessel was in a position of peril, and in an endeavor to refloat her for the common interest. In answer to that several points were set up by the defendants. It was said, in the first place, that the vessel was not in a position of peril, that she was in no real danger, being in inland waters 20 miles from the sea, and that it was merely a matter or rising water and, if necessary, the assistance of a tug to get her off. He (his Lordship) held that while the danger was not very great, there was a position of peril within the meaning of the York/Antwerp Rules. The danger was really substantial enough to constitute the use of the engines and the risk of damage which they underwent, and the damage, if any, which resulted, damage within the meaning of the Rules.

The next point raised in opposition to the whole of the claim was that the vessel was unseaworthy and went ashore by reason of her unseaworthiness. The unseaworthiness alleged was in respect of her engines

and boilers, and it was said that in consequence she had not enough steam, and so got on a shoal. That story was vouched for in an affidavit or declaration by the pilot, but there was no other evidence of it. "I think" said his Lordship, "that there was some difficulty about getting up steam, but I cannot think that the master or pilot would really have started on the voyage with such a deficiency of steam as that which the pilot subsequently speaks of, and I cannot, of course, ignore the obvious fact that the pilot would naturally look around for some excuse for having got the vessel upon the ground, and I am not satisfied and I do not find that he is right when he charges want of steam. In consequence that point fails."

Then came the consideration what, if any of the large sums claimed by the plaintiffs were really due to efforts to refloat the vessel. Damage sustained by reason of the vessel going on the ground or while she was going on was not, of course, recoverable by the plaintiffs. It was only damage caused by endeavours to refloat in respect of which they could claim. With regard to the boilers, in the items of the plaintiffs' claim the amount allowed in general average was some 38,500 marks. In his view none of that was recoverable by the plaintiffs in general average. What was said for the plaintiffs, shortly, was that when the vessel was on the ground the main injection, and after that some of the other methods of getting water into the piping system of the ship were blocked with mud, and that there was, therefore, a shortage of water in the piping system. It was further said that the condenser got overheated and leaked, and that, in consequence, large quantities of salt water then, and still more in the course of the subsequent voyage, got into the boilers, and that that was the cause of the scale found at Ham-

burg. He was not satisfied of any of those necessary items of proof in the case. There was some obstruction of the injection, no doubt, but he was not satisfied that there was any great shortage of water in the piping system, and he was certainly not satisfied that it went so far, or that the engines were worked so long and so hot as to cause the condenser to leak. He did not believe that any large quantity of water got into the boilers from any such cause as that. On the other hand, he had come to the conclusion that these boilers were often fed with salt water, one of the very worst things for water tube boilers. Why it was that this course was adopted on each occasion that it was adopted he did not know, but in this connection he did not place the least confidence in the evidence which was given by the second engineer. In view of these circumstances, he was unable to attribute any part of the state of things found in the boilers at Hamburg to the efforts made to refloat the vessel, when she was aground at Jacksonville. That eliminated altogether the largest part of the plaintiffs' claim.

Next came the matter of the engines, and in this respect the plaintiffs had satisfied him that the vessel had gone through her No. 1 periodic survey, with regard to engines as well as hull, about a year before the casualty mentioned in the case. Nevertheless, he thought the greater part of the sum claimed in respect of the engines was not attributable to the efforts made to get the CHARTERHAGUE afloat. He could not avoid the conclusion—just as he thought the real facts about the boilers had not been told to him—that he had not been told the real facts about the engines, and that there was more trouble about the condition of those engines that one, at any rate, of the plaintiffs' witnesses would allow. The period for which the engines were worked at the time of refloating was, he thought,

very short, and the conditions were not nearly so bad as witnesses said they were.

His Lordship thought that if one-third of the amount set down by the plaintiffs was allowed in general average that would be quite enough. That was a figure which would be subject to any adjustment or correction which might be necessary. For repairs to the fittings of the ship and the hire of the tug, he thought the proper sum to allow was £50 in all. There would be something to be added for consequential items, dock dues and so forth. The parties must calculate those for themselves and allow proportionate amounts. Generally speaking, the parties must ascertain the total amounts due to plaintiffs on the lines which he had indicated. If they would do that they would have liberty to apply, and he would give judgment for the sum so ascertained by agreement. On the counterclaim, of course, the defendants would have to have judgment for the difference between the total amount ascertained and the £1203 14s. 2d. Each side would have to pay their own costs.

A full report of the Judgment will appear in *"Lloyd's List Law Reports."*

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BOWRING, JONES & TIDY, LTD., RESPONDENT.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

THEODORE L. BAILEY,
Counsel for Respondent.

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BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

There is no longer any actual controversy between the parties and the writ of certiorari heretofore granted should be dismissed.

The respondent moves to dismiss the writ of certiorari heretofore granted on October 21, 1929, on the ground that it has obtained substantially everything it could recover against the petitioner in this appeal by a decision of Mr. Justice Roche in the Kings Bench Division, reported in Lloyd's List & Shipping Gazette, April 2, 1930, a copy of which is annexed to the affidavit in support of this motion to dismiss. There are

no longer any rights of property actually controverted in the instant case, and the question has become moot. That petitions have been dismissed before by this court under analogous circumstances appears in the case of *California v. San Pablo and Tulare Railroad Company*, 149 U. S. 308, 313, 314 (1892), and cases cited therein. In the leading case of *Mills v. Green*, 159 U. S. 651 (1895), the court, by Mr. Justice Gray said at page 653:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect; and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsive evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & Tulare Railroad*, 149 U. S. 308."

In the case of *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170 (1895), the court declined to hear further argument in the case, and the appeal was dismissed on the authority of *Mills v. Green* (159 U. S. 651), *supra*.

It is respectfully submitted that the writ of certiorari heretofore granted be dismissed for want of anything upon which it can operate. *Kimball v. Kimball*, 174 U. S. 158, 163 (1898), and cases therein cited.

The instant case does not involve a moot situation created by the intervention of a State Statute after a decision is rendered in lower court and before the questions are presented to this court. In such cases the meaning and effect of the State Statute was left for the determination of the State court. To leave the question free for the State court, the judgment below is invariably set aside, since the dismissal of the appeal might leave the judgment to be enforced as rendered. *State of Missouri ex rel. Wabash Railway Company v. Public Service Commission of Missouri*, 273 U. S. 126, 131 (1926). In the instant case the respondent is now ready to enter an order of discontinuance in the United States District Court for the Southern District of New York, where the suit originally commenced.

The American court obtained jurisdiction first. It would retain same, except for the moot situation caused by the prior English decision.

The court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. *Hull v. Burr*, 234 U. S. 712 (1913). It has the right to proceed to final determination. *Mutual L. Ins. Co. v. Harris*, 96 U. S. 588 (1877). In the instant case, the English proceeding had commenced subsequent to the institution of suit in this country. The

English case, involving the same subject matter as in the instant case has already been decided, which in turn has created a moot situation. Moot questions require no answer. *Missouri K. & T. R. Co. v. Ferris*, 179 U. S. 602 (1900).

The moot situation arose despite respondent's effort to stay suit in England, in view of the suit having been first instituted in the American court. Costs should be awarded to respondent on this appeal and in the courts below as suit was properly brought by the respondent in the American court.

It is respectfully contended that costs be awarded to respondent on this appeal on the ground that the instant suit was commenced at a time prior to the commencement of the English suit. The fact that the earlier English decision compels respondent to move for a dismissal of the petition heretofore granted is not traceable to any act of misconduct on its part. Every step was taken in England to have the suit there await the outcome of the action in this country. The petitioners, having forcefully contended, in the English case, that no delay need suspend the course of the suit, have by their conduct, indirectly at least, caused a situation to arise, which respondent by its own acts sought to avoid.

Respectfully submitted,

THEODORE L. BAILEY,
Counsel.

New York, April, 1930.